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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 657

SAN JACINTO SAND COMPANY, INC.,
Petitioner,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,
Respondent.

REPLY TO BRIEF IN OPPOSITION

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INDEX

	Page
GENERAL STATEMENT	1
THIS COURT DOES HAVE JURISDICTION	2
REASONS FOR GRANTING WRIT	
I. A declaratory judgment proceeding which is sui generis cannot be used to subvert the constitutional limitations on the taking of privately owned land without the payment of compensation	4
II. The petitioner is entitled to the protection of the rule in *Williams* v. *Thompson*, 256 S.W. 2d 399 (Tex. 1953) which denies to a landowner the right to compel an easement holder to provide lateral support for the landowner's land which abuts on the easement land	8
III. The petitioner is denied due process of law and equal protection of the law when a motion for judgment which raises an abandonment issue is not treated as an amendment to the petitioner's pleadings or as a proper basis for new trial	10
The nature of the declaratory judgment procedure	11
The petitioner's motion for judgment as an amendment to its pleadings	12
IV. The Court of Appeals denied the petitioner due process of the law when it presumed that the respondent's toil engineer's unequivocal testimony as to the abandonment in place of the respondent's pipes and cables did not mean that the respondent had not abandoned its easements	13
CONCLUSION	14
PROOF OF SERVICE	15
APPENDIX A-1	1a

CITATIONS

Cases

Bailey v. *Alabama*, 219 U.S. 219 (1911) 14
Bailey v. *Anderson*, 326 U.S. 203 (1945) 3
Cobb v. *Harrington*, 144 Tex. 360, 190 S.W. 2d 709 (1945)..... 11
Consolidated Turnpike Co. v. Norfolk & O. V. Ry., 228 U.S. 326 (1913) 3
Erie R. Co. v. *Tompkins*, 304 U.S. 64 (1938) 9
Freeport Motor Casualty Co. v. *Tharp*, 406 Ill. 295, 94 N.E. 2d 139 (1950) 12
New York ex rel Bryant v. *Zimmerman*, 278 U.S. 63 (1928).... 3
New York Times v. *Sullivan*, 376 U.S. 254 (1964) 14
Northern Transportation Company v. *Chicago*, 99 U.S. 635 (1897) 7
Pennsylvania Coal Co. v. *Mahon*, 260 U.S. 393 (1922) 4, 7
Radio Station WOW, Inc. v. *Johnson*, 326 U.S. 120 (1945) 3
Simon v. *Nance*, 100 S.W. 1039 (Tex. Civ. App. 1907, no writ hist.) 7
Stone v. *Farmers Loan & Trust Co.*, 116 U.S. 307 (1886) 5
Williams v. *Thompson*, 152 Tex. 270, 256 S.W. 2d 399 (1953) 8, 9

Constitutional Provision

U.S.C.A. Const. Amndt. XIV, Sec. 1 4

Rules of Civil Procedure

Texas Rules of Civil Procedure

Rule 67 13
Rule 94 13
Rule 299 13

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

GENERAL STATEMENT[1]

The jurisdictional issue raised by the respondent is an illusory one which evaporates when examined in the light of the record and the rules developed by this Court in respect to the timely raising of federal questions in state court proceedings.

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[1] References to the record were inadvertently omitted from the Statement of the Case appearing in the Petition at pages 8 through 11. There is attached to this Reply as Appendix A-1 a reference to the parts of the record which are authority for the factual statements made in the Statement of the Case in the Petition.

The declaratory judgment proceeding involved in this case rests upon a constitutionally deficient principle, namely that the federal constitutional prohibition against the taking of a citizen's property without the payment of compensation *is not applicable* to a declaratory judgment proceeding, which does not set over a specified amount of land to respondent, *but merely prohibits the petitioner from excavating 314,370 cu. yds of sand and gravel which will preserve the respondent's easements from erosion by the San Jacinto River.* Constitutional rights cannot be destroyed by specious legal distincitions or by a resort to obtuse quais legal-economic considerations, such as the protection and preservation of the integrity of the thousands of easements that blanket the State of Texas, as was done by the Court of Civil Appeals for the 14th Supreme Judicial District of Texas (Petition — Appendix A, p. 13a; 426 S.W. 2d 338, 345)

THIS COURT DOES HAVE JURISDICTION

The respondent urges this Court to decline to review this case because the federal constitutional question was not timely raised, that is that the federal question was first raised in a petition for rehearing.

The respondent has inaccurately described the record in the case. The federal constitutional question was timely raised by the petitioner's Motion for Leave to File First Amendment to Application for Writ of Error[2] which the

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[2] By motion contemporaneously filed, this Court has been requested to allow the petitioner to enlarge the record before the Court to include a certified copy of the Motion for Leave to File First Amendment to Application for Writ of Error which was filed with the Supreme Court of Texas on July 19, 1968.

Supreme Court of Texas separately granted[3] on July 24, 1964, prior to the time that it denied the petitioner's Motion for Rehearing. The Court's order stated as follows:

> "Motion of petitioner, San Jacinto Sand Company, Inc., to amend application for writ of error to the Court of Civil Appeals for the Fourteenth Supreme Judicial District having been duly considered by the Court, it is ordered that said motion be, and hereby is, granted, and that the application for writ of error be amended as prayed for therein."
>
> "And the Court having determined that the application for writ of error as amended presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused."

The test of whether the court of last resort of the state has been presented with and in fact considered a federal question is whether the court entertains and specifically decides the issue, and such decision is clearly indicated in the record. *Consolidated Turnpike Co.* v. *Norfolk & O. V. Ry.*, 228 U.S. 326, 334 (1913); *Radio Station WOW, Inc.*, v. *Johnson*, 326 U.S. 120, 128 (1945); *Bailey* v. *Anderson*, 326 U.S. 203, 207 (1945); *New York ex rel Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928). The foregoing test has clearly been met in this case, as evidenced by the Court's rulings as set forth above.

The Supreme Court of Texas, by its action in granting the petitioner's Motion to Amend the Application for Writ of Error, determined that there had been a compliance with all relevant sections of the Texas Rules of Civil Procedure.

The petitioner's Motion for Rehearing incorporated by reference the errors assigned in the Application for Writ

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[3] See Section 3 of Summary of the ground for new trial and assignments of error in which constitutional issues were raised (Petition — Appendix C, pp. 22a, 23a)

of Error as amended. The Supreme Court of Texas understood the scope of the Motion for Rehearing and entered its ruling on the basis that there had been a timely raising of the federal constitutional question. The third paragraph of the order of the Supreme Court of Texas dated July 24, 1968, read as follows:

> "And petitioner's motion for rehearing of application for writ of error and application as amended having been duly considered by the Court, it is ordered that said motion be, and hereby is, overruled. It is further ordered that petitioner, San Jacinto Sand Company, Inc., and its surety, Fidelity & Deposit Company of Maryland, pay all costs incurred on this application."

I.

A DECLATORY JUDGMENT PROCEEDING WHICH IS SUI GENERIS CANNOT BE USED TO SUBVERT THE CONSTITUTIONAL LIMITATIONS ON THE TAKING OF PRIVATELY OWNED LAND WITHOUT THE PAYMENT OF COMPENSATION

The respondent's argument in opposition to this issue fails to deal with the fundamental question of whether under Section 1 of the Fourteenth Amendment to the Constitution of the United States a declaratory judgment proceeding can be used as a subterfuge by which 314,370 cu. yds. of sand and gravel having a retail value of $424,399 and a royalty value of $47,156 can be taken from the petitioner without compensating the petitioner for such loss.

The constitutional limitation upon a court's powers which prohibits the taking of a citizens property without the payment of compensation is a fundamental part of our constitutional system. *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922). The power to declare rights in a declaratory judgment proceeding is subject to the same constitutional

limitations as is the power of the State to regulate a common carrier. *Stone* v. *Farmers Loan & Trust Co.*, 116 U.S. 307 (1886). In the *Stone* case, *supra*, the Court in describing the state's authority to regulate a common carrier, said at page 331:

> "From what has thus been said it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fare and freights the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation or without the due process of law. . . ."

The respondent's argument in opposition ignores the constitutional limitations applicable to the taking of 314,370 cu. yds. of sand and gravel without compensation by saying that this is simply a case where a defendant lost some land and is dissatisfied with the decisions of the lower court.

The Court of Appeals' affirmation of the trial court's action is predicated upon the fact that the trial court correctly applied the doctrine of lateral and subjacent support.[4] Under a guise of protecting the integrity of the respondent's easements and the thousands of other easements that blanket Texas, the Court of Appeals declined to correct the constitutionally excessive taking of the peti-

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[4] The Court of Appeals' position is succinctly summarized as follows (Petition — Appendix A, p. 13a; 426 S.W. 2d 338, 345):

> ". . . We hold that the owner of the dominant estate, the easement owner, is entitled to lateral and subjacent support for its easements, its lines and its property lawfully thereon, and that the trial court correctly applied the doctrine of lateral and subjacent support. . . ." (Citations omitted)

tioner's land to protect the respondent's easements from the erosive action of the San Jacinto River as required by the trial court.[5]

Subject to the right of the citizens of Texas to have the equal protection of its laws, as described in Issue II of the Petition, the petitioner acknowledges that the courts of Texas have the power to declare the existence of a right to lateral and subjacent support for easements, to define prospectively what is required to provide lateral and subjacent support for easements, and thereafter by injunctive process to prevent any interference with the lateral and subjacent support so decreed.

The action complained of by the petitioner in this Issue I is the failure of the courts of Texas to require that the respondent compensate it for the 314,370 cu. yds, of sand and gravel taken from it to protect the respondent's easements from erosion by the San Jacinto River.

The respondent should not be allowed to confuse the constitutional issue herein presented by:

(a) Inaccurate statements of the circumstances that would cause the respondent's easements to be destroyed, that is, by attributing the destruction of the respondent's

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[5] The trial court's position is set forth in its Findings of Fact Nos. 27 and 29 (R-Tr. pp. 135, 137 Findings of Fact and Conclusions of Law):

> "27. The nature of the soil on the 17.584 acre tract is such that its stable slope of repose is approximately 3 to 1; i.e., 3 feet of slope for each one foot of depth. This would take into account the presence of water, and the rising or falling of the river level but would not take into account the effect of river action or velocity of the current of the San Jacinto River on this soil. . . ."
>
> "29. The flow and velocity of the San Jacinto River must be taken into account in determining the effect of dredging operations and excavations on either side of the 30 foot strip within which Southwestern Bell Telephone's easements are located."

easements to the petitioner, rather than to the erosive action of the San Jacinto River; or

(b) An incorrect equating of the reasonable enjoyment of easements with the right to lateral support of easements. *Northern Transportation Company* v. *Chicago,* 99 U. S. 635 (1897); *Simon* v. *Nance,* 100 S.W. 1039 (Tex. Civ. App. 1907, no writ hist.)

In equating the right of reasonable enjoyment of its easements with the right to have its easements protected from the erosive action of the San Jacinto River, the respondent stated its position as follows at page 7 of its reply brief:

> ". . . If, as the courts below held, respondent's easements are entitled to support and protection from the acts of the owner of the burdened tract, nothing has been 'taken'. Following the well-settled principles of easement law, the courts held that respondent acquired this right to support or protection as one of the rights it acquired when it secured its easements."

The simple answer to the foregoing statement is that it violates fundamental constitutional prohibitions against the taking of property without compensating the owner of the land which has been taken. *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393 (1922). In considering the analgous problem of the public's right to have a street supported which had been obtained in an eminent domain proceeding in which only surface rights had been acquired, this Court in *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393 (1922) held that the public could not obtain support for the street without paying for it and said at page 415:

> "The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for. If in any case its representatives have been so short sighted as to acquire only surface rights without

the right of support we see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place and refusing to pay for it because the public wanted it very much. The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. Hairston v. Danville & Western Ry. Co., 208 U. S. 598, 605, 28 Sup. Ct. 331, 52 L. Ed. 637, 13 Ann. Cas. 1008. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States".

"The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. . . ."

Neither the respondent through its unilateral act nor the courts of Texas through judicial fiat can enlarge the respondent's rights under its easements to include the protection of the easements from the erosive action of the San Jacinto River without compensating the petitioner for land taken from it.

II.

THE PETITIONER IS ENTITLED TO THE PROTECTION OF THE RULE IN WILLIAMS v. THOMPSON, 256 S.W. 2d 399 (TEX. 1953) WHICH DENIES TO A LANDOWNER THE RIGHT TO COMPEL AN EASEMENT HOLDER TO PROVIDE LATERAL SUPPORT FOR THE LANDOWNER'S LAND WHICH ABUTS ON THE EASEMENT LAND

The respondent's argument in opposition to the foregoing point is that the courts of Texas have fashioned two sets of

rules in respect to the lateral support of property subject to easements, namely (1) the easement holder does not have to provide lateral support for the land that is subject to the easement; and (2) the owner of the land subject to an easement must provide lateral support for the easement to which his land is subject.

The respondent incorrectly states the rule of *Williams* v. *Thompson,* 152 Tex. 270, 256 S.W. 2d 399 (1953). The rule of the *Williams* case, *supra* is that the doctrine of lateral support is a doctrine applicable to *adjacent landowners* and is not applicable to the relationship that exists between the holder of an easement and the owner of the land subject to the easement.

The petitioner concedes that the common-law of Texas might ultimately produce the dual rules suggested by the respondent, *but until such time as the Supreme Court of Texas decrees the existence of dual rules,* the petitioner has been unconstitutionally deprived of the equal protection of the common-law of Texas as exemplified by the rule in *Williams* v. *Thompson,* supra; *Erie R. Co.* v. *Tompkins,* 304 U.S. 64 (1938). The constitution of the United States compels the reversal of the holdings of the lower courts, or in the alternative a remanding of the case to the Court of Civil Appeals for a determination under Texas law as to the applicability of the rule in *Williams* v. *Thompson, supra,* to the instant case.

III.

THE PETITIONER IS DENIED DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW WHEN A MOTION FOR JUDGMENT WHICH RAISES AN ABANDONMENT ISSUE IS NOT TREATED AS AN AMENDMENT TO THE PETITIONER'S PLEADINGS OR AS A PROPER BASIS FOR NEW TRIAL

The respondent argues that the petitioner was five months late in pleading the respondent's abandonment of its easements and thus waived the defense of abandonment. The respondent's argument is in error both technically and in the implications that the respondent seeks to have drawn from the delay in the entry of the Final Judgment, which delay was the result of a mutual understanding reached by counsel for the petitioner and respondent.[6]

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[6] This proceeding was instituted when the respondent filed its original petition and requested and obtained a restraining order that *shut down the petitioner's entire operations.* The petitioner was informed after a hearing on the restraining order that a temporary injunction would be granted prohibiting excavations until the rights of the parties could be declared in a formal hearing. The trial judge indicated a willingness to adjust his schedule and give the parties an early non-jury hearing if they so desired. The *Hobson-like choice* presented to the petitioner was either an immediate non-jury trial without recourse to discovery procedures, or a hearing at some indefinite date in the future before which discovery procedures could be instituted in respect to the respondent's operations, *but during which period the petitioner's operations would be shut down.* The petitioner elected an early trial and the trial was held. When the trial court ruled against the petitioner, the petitioner's counsel, Charles J. Sullivan, and the respondent's counsel, Donald Howell, conferred and agreed that prior to the time that a judgment was submitted to the trial court for signing, Mr. Sullivan would seek to dispose of or otherwise handle in a manner satisfactory to him certain pending legal proceedings involving the 17.584 acre tract, *which were unrelated to the declaratory judgment proceeding.*

THE NATURE OF THE DECLARATORY JUDGMENT PROCEDURE

A declaratory judgment is neither legal nor equitable, it is sui generis, *Cobb* v. *Harrington,* 144 Tex. 360, 190 S.W. 2d 709 (1945). A natural concomitant of such a proceeding is that the equitable doctrine that *he, who seeks equity, must do equity* will be of paramount importance. As the moving party in a declaratory judgment proceeding *it was incumbent upon the respondent as an officer of the court* to state all relevant facts pertaining to its situation in clear, unmistakable and unambiguous language, for example it was the respondent's obligation to disclose the fact that it had made two initial installations and *thereafter abandoned in place* portions of such cables in connection with its replacements of its two existing underwriter cable crossings and *substituted at a new location a single and larger installation containing new and larger cables.*

Neither paragraph II nor paragraph III of the Plaintiff's Original Petition (R-Tr. pp. 3-5) clearly and unmistakably indicate the respondent's *abandonment in place* of portions of its original cables and the *installation of new cables at a new location.* When the skillfully drawn allegations set forth in paragraphs II and III of the Plaintiff's Original Petition are read in light of the evidence developed during the trial, the true nature of the respondent's position becomes apparent. Equally significant is the fact that the

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[6] Cont'd.

When the unrelated proceedings involving the 17.584 acre tract were taken care, counsel for the petitioner and respondent met and tried to formulate a mutually acceptable judgment. The parties did not reach agreement as to the form of the judgment and both the petitioner and the respondent submitted appropriate motions for judgment to the trial court. The petitioner's Motion For Judgment included a suggested Final Judgment that set forth the fact that the respondent had abandoned portions of its easements. The trial court *after an oral hearing* rejected the petitioner's Motion for Judgment in its entirety and entered the Final Judgment submitted by the respondent.

"gamesmanship" aspects of the respondent's plea for equitable and legal relief become apparent. The respondent's purposes, *but not justice's purposes,* are served when the respondent argues that the pleadings, including the petitioner's Motion for Judgment, do not place in issue the fact that the respondent was seeking lateral support for portions of its easements which it had already abandoned.

THE PETITIONER'S MOTION FOR JUDGMENT AS AN AMENDMENT TO ITS PLEADINGS

A declaratory judgment proceeding is not closed until the trial judge signs the final judgment in the case, at which time the judgment then officially becomes entered in the record. *Freeport Motor Casualty Co.* v. *Tharp, 406 Ill. 295, 94 N.E. 2d 139 (1950)*

The petitioner filed its Motion for Judgment and suggested Final Judgment with the trial court *prior to the time that the trial judge signed the Final Judgment in the case.* (R - Tr. pp. 79 - 96) The petitioner's suggested final judgment specifically raised the abandonment question.[7] In a declaratory judgment proceeding which is sui generis the filing of the petitioner's Motion for Judgment and suggested Final Judgment constituted a timely amendment of the petitioner's pleadings. *Freeport Motor Casualty Co.* v. *Tharp,* 406 Ill. 295, 94 N.E. 2d 139, (1950). This is especially true in light of the evidence in the record which clearly shows the fact and the intention on the part of the respond-

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[7] The issue of abandonment of portions of the respondent's easements was placed in issue by the Respondent's Trial Amendment to Plaintiff's Original Petition, which requested lateral support for the respondent's easements as they presently exist. (R-Tr. pp. 2-25; 124). When the Trial Amendment is considered in conjunction with paragraphs II and III of the Plaintiff's Original Petition, the scope of the respondent's existing easements was placed in dispute.

ent to abandon portions of its easements, namely the testimony of the respondent's Toll Engineer that the respondent had abandoned in place 197 ft. of its old pipes and cables (R-S.F. p. 32); documentary records of the respondent which showed the clear intention to abandon 197 ft of the easements (R-S.F., Pltf's. Exs. 15, 16; Defd's. Ex. 3, pp. 21, 29); the oral argument before the trial judge prior to the time when he signed the Final Judgment (R-S.F., supplemental pages 1-35).

In view of the foregoing facts the petitioner was unconstitutionally denied due process of law and equal protection of the law when the Court of Appeals determined that: (a) the abandonment issue had not been pleaded in a manner that satisfied the requirements of Rule 94 of the Texas Rules of Civil Procedure and accordingly had been waived; and (b) the issue of abandonment had not been tried by express of implied consent in a manner that satisfied the requirements of Rule 67 of the Texas Rules of Civil Procedure.

IV.

THE COURT OF APPEALS DENIED THE PETITIONER DUE PROCESS OF THE LAW WHEN IT PRESUMED THAT THE RESPONDENT'S TOLL ENGINEER'S UNEQUIVOCAL TESTIMONY AS TO THE ABANDONMENT IN PLACE OF THE RESPONDENT'S PIPES AND CABLES DID NOT MEAN THAT THE RESPONDENT HAD NOT ABANDONED ITS EASEMENTS

The petitioner was denied procedural due process and equal protection of Rule 299 of the Texas Rules of Civil Procedure when the Court of Civil Appeals refused to remand the case to the trial court on the ground that remand was unnecessary since the impact of the clear, absolute unequivocal testimony of the respondent's toll engineer

as to the abandonment in place of the respondent's cables (R-S.F. p. 32), *could be nullified by assuming that the engineer meant to say something other than what he actually said.* (Petition — Appendix A, p. 10a; 426 S.W. 2d 338).

"The power to create presumptions is not a means of escape from constitutional restrictions." *Bailey* v. *Alabama,* 219 U.S. 219, 239 (1911); *New York Times* v. *Sullivan,* 376 U.S. 254 (1964). The Court of Appeals as an instrument of the State of Texas cannot presume a fact, which fact when once presumed has the effect of destroying a legal interest of the petitioner, namely the right to be free from the obligation of providing lateral support for easements which had in fact been abandoned.

CONCLUSION

For the reasons stated in Petition For Writ of Certiorari and in this Reply, the writ of certiorari should be issued.

Respectfully submitted

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AFFIDAVIT OF SERVICE

THE STATE OF TEXAS }
COUNTY OF HARRIS } ss.:

BEFORE ME, the undersigned authority, on this day personally appeared CHARLES J. SULLIVAN, who after first being duly sworn did upon his oath depose and say:

The affiant, Charles J. Sullivan, did on this day cause a true and correct copy of the Reply to Brief in Opposition in the case of San Jacinto Sand Company, Inc. v. Southwestern Bell Telephone Company, Docket No. 657, to be served upon David T. Searls, attorney for Respondent Southwestern Bell Telephone Company, and upon Donald Howell and John L. Murchison, Jr., of Vinson, Elkins, Weems & Searls, by delivering the same to them at their office in the First City National Bank Building, Houston, Texas, and to James M. Shatto, Box 1530, Houston, Texas 77001, and James Hand, 308 South Akard, Dallas, Texas, 75202, by depositing a copy of such Reply to Brief in Opposition in a United States mailbox with first class air mail postage prepaid.

.....
CHARLES J. SULLIVAN

SWORN AND SUBSCRIBED TO BEFORE ME, the undersigned authority this ..... day of ....., 1968.

.....
Notary Public in and for
Harris County, Texas

APPENDIX A-1

References to Record That Support Facts Set Forth in STATEMENT OF THE CASE (Petition pp. 8-10)

Statement of the Case Page No.	Factual Statement	Record Reference
8	Findings of Fact Nos. 27 and 29	Tr. 135, 137
8	Trial court's order and judgment (a) Enjoining excavations in 200 ft. strip	Tr. p. 67
9	(b) Establishing variable excavation slopes	Tr. p. 68, 69
10	Recommendations to respondent by consulting engineers	S.F. Defd's Ex. 1, p. 6; Ex. 2, pp. 2, 3